

**UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DISTRICT**

SALA NAAMBWE and YVETTE NIMENYA	Case No.: 4:17-cv-04123-LLP
Plaintiffs,	DEFENDANT’S TRIAL BRIEF ON EQUAL
vs.	OPPORTUNITY OFFENDERS AND
SMITHFIELD FOODS, INC.	NONDISCRIMINATORY HARASSMENT
Defendant.	

Defendant Smithfield Packaged Meats Corp. (“Smithfield”), files its Trial Brief regarding equal opportunity offenders and nondiscriminatory harassment under Title VII.

To prove actionable retaliation or discrimination, Plaintiffs must show they faced discriminatory adverse action – that they were treated differently because of their race, national origin or protected activity and that the treatment was materially adverse to their employment. Title VII is not a general civility code, but instead it is “predicated on discrimination,” and its plain language requires a plaintiff to show disparate treatment. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998); *Holman v. Indiana*, 211 F.3d 399, 404–05 (7th Cir. 2000) (finding Title VII inapplicable where alleged harasser treated male and female employees equally by harassing them both). When employees act rudely or inappropriately toward their co-workers regardless of their race, national origin, or protected activity, their conduct does not fall within the purview of discrimination law. *See, e.g., Sampson v. City of Fort Smith, Arkansas*, 255 F. Supp. 3d 873, 893–94 (W.D. Ark. 2017) (finding no discrimination where police department unfairly provided answers to test to ‘favored’ applicants, but favorites were not based on race); *Ellison v. Wal-Mart Stores, Inc.*, No. 11-5070, 2012 WL 1121332, at *10 (W.D. Ark. Apr. 3, 2012) (no Title VII sex discrimination based on rumors about an employee relationship because the rumors applied to both sexes).

Further, even if the conduct is directed at Plaintiffs, which Defendant denies, specifically, general rudeness or profanity does not qualify as actionable harassment or adverse action under the law. *Burkhart v. Am. Railcar Indus., Inc.*, 603 F.3d 472, 477 (8th Cir. 2010) (“standoff attitude” and “petty slights or minor annoyances” do not qualify as actionable retaliation); *Thorn v. Amalgamated Transit Union*, 305 F.3d 826, 831 (8th Cir. 2002) (“[I]n employer retaliation cases, ‘ostracism and rudeness by supervisors and co-workers do not rise to the level of an adverse employment action.’”); *Somoza v. Univ. of Denver*, 513 F.3d 1206, 1214–15 (10th Cir. 2008) (plaintiffs did not establish actionable retaliation where alleged adverse action involved co-workers rolling their eyes and laughing at them during a staff meeting and causing embarrassment); *Harris v. Donahoe*, No. 4:11CV0411 TCM, 2011 WL 5222494, at *5 (E.D. Mo. Nov. 2, 2011) (no adverse action because “offensive” conduct did not cause plaintiff “concrete harm”); *Casey v. Riedel*, 195 F. Supp. 2d 1122, 1131 (S.D. Iowa 2002) (finding “ostracism and rudeness... do not rise to the level of an adverse employment action, unless evidence indicates the behavior had an impact on the employee's job title, salary, benefits, or any other material aspect of employment”).

Date: October 19, 2018

Respectfully submitted,

SMITHFIELD PACKAGED MEATS CORP.

By: /s/ Lisa K. Marso

Lisa K. Marso
BOYCE LAW FIRM, L.L.P.
300 S. Main Avenue
Post Office Box 5015
Sioux Falls, SD 57117-5015
605.336.2424 – PHONE
605.334.0681 – FAX
LKMARSO@BOYCELAW.COM

Susan F. Wiltsie (*Admitted Pro Hac Vice*)
Andrea R. Calem (*Admitted Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, N.W.
Washington, D.C. 20037
202.955.1500 – PHONE
202.778.2201 – FAX
SWILTSIE@HUNTONAK.COM
ACALEM@HUNTONAK.COM

Amber M. Rogers (*Admitted Pro Hac Vice*)
HUNTON ANDREWS KURTH LLP
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202
214.468.3308 – PHONE
214.979.3929 – FAX
AROGERS@HUNTONAK.COM

***ATTORNEYS FOR DEFENDANT
SMITHFIELD PACKAGED MEATS CORP.***

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served via the Court's electronic filing system on the following counsel for Plaintiffs:

Stephanie E. Pochop, Esq.
Johnson Pochop & Bartling
405 Main Street
Post Office Box 149
Gregory, South Dakota 57333

/s/ Lisa K. Marso